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*Digest: In re Adoption of Joshua S.*

*Ryan Odenwalder*

Opinion by Moreno, J., expressing the unanimous view of the Court.

Issue

Can attorney's fees under California Code of Civil Procedure section 1021.5 be imposed on a party who has adversely affected the public interest only by raising an issue during litigation over private rights from which important appellate precedent happens to emerge?

Facts

Sharon and Annette had been in a committed relationship since 1989.<sup>1</sup> In 1996 and 1999, Sharon was artificially inseminated and gave birth to Zachary and Joshua, respectively.<sup>2</sup> Sharon consented to Annette adopting both children while Sharon retained her parental rights.<sup>3</sup> Thereafter, Sharon and Annette ended their relationship and Annette left the family home.<sup>4</sup> Annette moved for an order of adoption, while Sharon moved for court approval to withdraw her consent to adopt and to dismiss Annette's petition on the grounds that the adoption Annette sought was unlawful.<sup>5</sup>

The trial court denied Sharon's motion to dismiss the adoption.<sup>6</sup> Sharon sought a writ of mandate, which the Court of Appeal granted.<sup>7</sup> Annette used the services of attorney, Charles Bird to represent her in these proceedings.<sup>8</sup> Bird told Annette that oral argument at the Court of Appeal would cost between eight and ten thousand dollars and that further litigation, if she lost there, would cost more than she could pay.<sup>9</sup> But he agreed to represent her because he was concerned for the precedent set by the case and because of the possibility of recovering attorney fees based on the "public benefit resulting from the work."<sup>10</sup>

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<sup>1</sup> *In re Adoption of Joshua S.*, 174 P.3d 192, 194 (Cal. 2008).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 195.

<sup>10</sup> *Id.*

The Court of Appeal found the adoption had no statutory basis.<sup>11</sup> Annette appealed to the California Supreme Court, which found the sought-after adoption lawful but remanded for resolution of factual findings.<sup>12</sup>

Before the factual issues were resolved, Annette moved the court to award her \$138,939.78 in attorney's fees, pursuant to California Code of Civil Procedure section 1021.5.<sup>13</sup> The trial court awarded \$92,049.15 in attorney's fees because the California Supreme Court's decision positively conferred a nonpecuniary benefit to a class of people and resolved an important issue of law.<sup>14</sup> The Court of Appeal reversed, reasoning that Annette's personal stake in the outcome of the case, her adoptive rights, outweighed the cost of the litigation.<sup>15</sup> The California Supreme Court granted review.<sup>16</sup>

### Analysis

Section 1021.5 permits an award of attorney's fees to the prevailing party when: (1) the plaintiff's action results in the enforcement of an important right that affects the public interest; (2) a significant benefit is conferred to the general public or a large class of people; and (3) the necessity and financial burden of private enforcement would make the award appropriate.<sup>17</sup> The third factor has been interpreted to mean that the need to pursue the lawsuit caused the plaintiff a financial burden out of proportion with his or her personal stake in the matter.<sup>18</sup> The courts normally compare "the expected value of the litigation at the time it was commenced with the costs of litigation."<sup>19</sup>

The Court found that the litigation met the first two prongs, estimating that ten to twenty thousand second parent adoptions would have been jeopardized by the Court of Appeal's invalidation of them.<sup>20</sup> When it turned to the third prong, however, it found that Annette's interest in the case was immeasurable, and, therefore, it would be difficult to compare its value with the cost of the litigation.<sup>21</sup>

Annette argued that a plaintiff in such situation automatically met the third requirement as a matter of law.<sup>22</sup> Citing several appellate court opinions, Sharon argued that nonpecuniary interests did not automatically

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 194.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 195.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 195, 200.

<sup>17</sup> *Id.* at 195 (citing *Woodland Hills Residents Ass'n., Inc. v. City Council*, 593 P.2d 200 (Cal. 1979)).

<sup>18</sup> *Id.* (citing *Woodland Hills Residents Ass'n., Inc. v. City Council*, 593 P.2d 200 (Cal. 1979)).

<sup>19</sup> *Id.* (citing *Los Angeles Police Protective League v. City of Los Angeles*, 232 Cal. Rptr. 697 (Cal. Ct. App. 1986)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 196.

<sup>22</sup> *Id.*

qualify a plaintiff for attorney's fees.<sup>23</sup> The Court observed that, even if Annette's argument was incorrect, the trial court was not necessarily wrong to decide that she qualified for attorney's fees if their cost outweighed their nonpecuniary benefit.<sup>24</sup> Reframing the issue, the Court decided not to answer whether the trial court abused its discretion on the balancing issue, but instead reviewed whether Sharon was the type of party against whom the statute intended to impose payment of attorney's fees.<sup>25</sup>

Sharon contended she should not have to pay attorney's fees simply because her litigation to adjudicate her private rights happened to result in an appellate precedent potentially compromising the rights of a class of people.<sup>26</sup> The Court agreed.<sup>27</sup> The Court noted that Section 1021.5 was an exception to the rule that parties to a lawsuit normally pay their own attorney's fees.<sup>28</sup> The Court acknowledged that the reason for this exception was not expressly articulated, but that it seemed to justify imposing "public interest attorney fees on parties that have done something to adversely affect the public interest."<sup>29</sup> The Court noted that all twenty of its former published opinions in which attorney's fees had been awarded under Section 1021.5 involved a defendant whose behavior impaired the rights of the public or a significant class of people.<sup>30</sup>

The Court noted that language of the statute permits attorney's fees resulting in the "enforcement" of rights.<sup>31</sup> From this language, the Court said, a defendant must infringe on a person's rights to require enforcement of these rights through litigation.<sup>32</sup> The Court then looked to the legislative history.<sup>33</sup> The Senate documents stated that the statute was intended to award attorney's fees in "public interest litigation."<sup>34</sup> The Court interpreted this language as "enforcing laws that a governmental or private entity was violating, rather than private litigation that happened to establish an important precedent."<sup>35</sup> Finally, the Court stated that it formerly held that Section 1021.5 did not apply against a defendant when another person was more responsible for the actions or policies that gave rise to the litigation.<sup>36</sup>

The Court clarified that it was not holding that mere involvement in litigation alone could always bar a Section 1021.5 claim.<sup>37</sup> The Court said

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 196–97.

<sup>27</sup> *Id.* at 197.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 197.

<sup>31</sup> *Id.* at 198.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (internal quotations omitted) (citation omitted).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 198–99 (citing *Connerly v. State Personnel Bd.*, 129 P.3d 1 (Cal. 2006)).

<sup>37</sup> *Id.* at 199.

that, if the defendant initiates litigation that is determined to adversely affect the public interest, the litigation alone could warrant a claim for attorney's fees.<sup>38</sup> The Court differentiated this situation from Sharon's, however, because she had no institutional interest in the litigation and merely wanted to settle her private rights.<sup>39</sup>

Finally, the Court rejected Annette's argument that its holding was inconsistent with the principle that bad faith is not required for a Section 1021.5 claim.<sup>40</sup> The Court found that attorney's fees could still be awarded against a person who adversely affects the public rights, even in good faith.<sup>41</sup> The Court also said that an award could be granted if the rights being violated were "somewhat intangible," and that a defendant paying the award can be an individual, corporation, or government entity.<sup>42</sup>

### Holding

The Court held that an award for attorney's fees under Section 1021.5 may be imposed only on parties who have adversely affected the rights of the public or a substantial class of people, other than by raising an issue in the course of litigation over private matters that set a legal precedent adversely affecting the public.<sup>43</sup>

### Legal Significance

As a result of this decision, mere litigation of the rights of private parties will not warrant a Section 1021.5 claim for attorney's fees, even if the litigation results in a precedent that could negatively affect the public. Therefore, attorneys must be more careful when accepting a case if they intend to obtain their attorney's fees through a Section 1021.5 claim rather than from their clients.

The Court reinforced the principle that a Section 1021.5 defendant may be a corporation, private individual, or government entity, but litigation alone would not warrant a claim unless the defendant had an institutional interest in litigation that was determined to adversely affect public rights.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 199-200.

<sup>43</sup> *Id.* at 200.